

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JUSTIN GUY, individually and on
behalf of those similarly situated,

Plaintiff,

v.

Case No. 20-cv-12734-MAG-EAS
HON. MARK A. GOLDSMITH

ABSOPURE WATER COMPANY, LLC
a domestic limited liability company,

Defendant.

DEFENDANT’S MEMORANDUM REGARDING FORM OF JUDGMENT

Defendant Absopure Water Company, LLC (“Absopure”), pursuant to the Court’s Order Following December 19 Conference (Dkt. 236), hereby submits this memorandum regarding the form of judgment. A proposed form of judgment is attached hereto as Exhibit 1.

Also pursuant to the Court’s December 19 Order there are three outstanding issues that the Court will address: whether the Motor Carrier Act “(MCA”) exempts Plaintiffs from the overtime requirements of the Fair Labor Standards Act the, whether any Plaintiffs have driven small vehicles more than a *de minimis* amount such that an exception to the MCA exemption applies, and whether or not, as a matter of law, Plaintiffs have proven that any alleged violation by Absopure was willful.

(Dkt. 236). The Parties' memoranda on the *de minimis* standard are due today and those on the MCA exemption and willfulness are due on or before January 24. (*Id.*).

Absopure contends that the MCA exemption applies in this case. As Absopure has discussed extensively with the Court, the Department of Labor ("DOL") conducted an investigation of Absopure's pay practices regarding its Sales and Service Specialist in the 2003 to 2005 timeframe and found that these employees were exempt pursuant to the MCA, confirming the correctness of Absopure's position. The DOL has now responded to Absopure's Freedom of Information ("FOI") request and has produced its report showing this ruling. The cover letter for the DOL Wage and Hour Division's FOI request is attached hereto as Exhibit 2. The first responsive document, entitled "WHISARD Compliance Action Report" is attached as Exhibit 3 and the second document, entitled "FLSA Narrative", is attached as Exhibit 4. These documents refer to an investigation case number 1423171 and state that an investigation of Absopure was conducted by the DOL from November 18, 2003 to November 17, 2005. (Exhs. 3 and 4).

The key statement of the report is found on page 2 of the FLSA Narrative":

A 13(b)(1) exemption was granted for all delivery drivers, some of whom regularly cross state lines on their delivery routes; all of whom carry products which are shipped to Absopure from out-of-state manufacturers, briefly warehoused, and ultimately delivered to Absopure customers by the drivers ("practical continuity of movement across state lines from the point of origin to the point of destination", per a JRC call held on June 30, 2006). These products are items such as cups, water coolers and coffee makers.

(Ex. 4, p. 2). This statement unequivocally shows that the DOL found that Absopure's Sales and Service Specialists, the "delivery drivers", are exempt under the Motor Carrier Act. (*Id.*). As Absopure will demonstrate in its memorandum on the MCA exemption, the DOL's ruling only confirms the inescapable conclusion that Plaintiffs are exempt employees.

Absopure further contends that the case law is abundantly clear that the small vehicle exception must be applied on a week-by-week basis and thus the monthly averages asserted by Plaintiffs cannot, as a matter of law, show that the exception applies. Accordingly, Absopure contends that MCA exemption applies to all Plaintiffs and therefore Absopure has no liability in this matter without exception.

Finally, although Absopure believes the issue is moot, it nonetheless will show that Plaintiffs have failed to prove willfulness as a matter of law.

Respectfully submitted,

Dated: January 9, 2024

s/ Ronald G. Acho

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P-23913

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CERTIFICATE OF CONCURRENCE

Defendant certifies that, in accordance the Court's December 19 Order (Dkt. 236), its counsel conferred in writing with Plaintiffs' counsel on January 8, 2024 concerning a propose form of judgment and requested counsel to concur in the relief sought in this motion, and that Plaintiffs' counsel has not responded.

LOCAL RULE CERTIFICATION

I, Michael O. Cummings, certify that this document complies with Local Rule 5.1(a), including: double-spaced (except for quoted materials and footnotes); at least one- inch margins on the top, sides, and bottom; consecutive page numbering; and type size of all text and footnotes that is no smaller than 10-1/2 characters per inch (for non-proportional fonts) or 14 point (for proportional fonts). I also certify that it is the appropriate length.

Dated: January 9, 2024

/s/ Michael O. Cummings

Michael O. Cummings

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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2024, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification to all parties of record.

Dated: January 9, 2024

/s/ Michael O. Cummings

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